



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

OCT 13 2015

REPLY TO THE ATTENTION OF

WW-16J

Ms. Marie Kopka  
Army Corps of Engineers  
St Paul District  
250 N. Sunnyslope Road, Suite 296  
Brookfield, Wisconsin 53005

Dear Ms. Kopka:

This letter is in response to the Public Notice for file number MVP-2010-00746-MHK, in which the Wisconsin Department of Transportation is proposing to construct the West Waukesha Bypass. The bypass is 5 miles in length along County Road TT between Interstate 94 to the north and State Highway 59 to the south, in Waukesha County, Wisconsin. The proposed project would result in the filling of 14.8 acres of wetland and approximately 0.22 acres of Pebble Creek and Unnamed tributaries would also be impacted due to new culvert construction, culvert extensions and creek realignment. The Public Notice states that these stream impacts are not permanent losses.

Avoidance

We have reviewed the proposed project to assess compliance with the Section 404((b)(1) Guidelines (Guidelines). The Guidelines require an applicant to avoid, minimize and then compensate for any unavoidable impacts to waters of the U.S. With regard to avoidance, the U.S. Environmental Protection Agency (EPA) was involved in the Environmental Impact Statement (EIS) review process for this project. For the majority of the alignment, we agreed that based on the information presented in the Draft EIS, the applicant had taken all practicable steps to avoid impacts to aquatic resources. We had concerns, however, with the proposed alignment just south of Sunset Drive, which would require that a portion of a fen be filled in in order to minimize impacts to a forested upland that is providing important interior forest bird breeding habitat.

As you know, the Guidelines at 230(10) (a) state that no discharge of fill material shall be permitted as long as the alternative does not have other significant adverse environmental consequences. The applicant has argued that they cannot avoid filling a portion of the fen (wetland 8) because the other alternative would cause significant adverse environmental consequences to the interior forest bird breeding habitat. EPA provided conditional concurrence with this alignment providing the applicant permanently protect the upland forest and preserve a

fen elsewhere in the watershed. EPA continues to concur with the proposed alignment provided adequate mitigation is provided.

#### Minimization

The public notice provides no information regarding the Best Management Practices (BMPs) that the applicant will use to minimize the potential adverse impacts of the fill activities on wetlands and streams. As a condition of a 404 permit, if granted, the applicant should be required to implement BMPs at all areas where streams or wetlands will be impacted. For example, all culvert extensions and new culvert construction needs to be designed to maintain or improve habitat in the stream. Culverts should be bottomless (3-sided) or if the culvert is 4 sided, the bottom should be buried below the stream bottom. In order to maintain stream channel stability, culverts should span a minimum of bankfull width of the stream.

We have concerns regarding the indirect impact the proposed project would have on the unfilled portions of the wetlands adjacent to the road. Changes to water levels and circulation patterns, increases in sediment and pollutant inputs to wetlands resulting from road construction have an adverse impact on wetland quality. The inclusion of wetland equalization culverts and the use of settling basins or other methods to remove sediment in road runoff before surface water enters wetlands and streams are examples of BMPs that will address these concerns. The applicant needs to provide information detailing the BMPs that will be implemented to ensure that construction work is limited to the smallest "footprint" possible. If a permit is issued for this project, we request that BMPs which will minimize direct and indirect impacts to wetlands, be included in the permit.

#### Mitigation

The proposed project will result in the filling of 14.85 acres of wetlands. It is our understanding that this acreage figure is based on the actual footprint of the fill associated with construction. The applicant needs to demonstrate that the construction activities associated with placing fill in wetlands will not result in any impacts from construction equipment in wetland areas that are not permitted to be filled. If the applicant cannot commit to keeping construction activities out of wetlands, not permitted for filling, then additional mitigation for wetland impacts may be required.

The public notice states that 0.35 acres of fen (wetland 8) will be impacted. This sedge fen is approximately 1.1 acres in size. Once 0.35 acres of this fen are filled, it is likely that the remaining portions of the fen will be degraded due to both direct and indirect impacts associated with filling activities. As you know due to their unique hydrology and water chemistry, fens are wetland type that typically cannot be re-established. For this reason we requested the applicant to mitigate for the impacts to the fen by preserving a fen elsewhere in the watershed. The applicant has proposed mitigating for the fen impacts by preserving Browns fen, an 8.9 acres fen and wetland complex currently owned by Waukesha County. In addition to preservation, the applicant is proposing to receive enhancement credit for work on 4.5 acres of the wetland complex associated with the fen. The enhancement would include removing reed canary grass from a 3 acre area and removing exotic shrubs from another 1.5 acres of the wetland complex.



The applicant is also asking for buffer credit for 13.8 acres of upland surrounding the wetland complex.

We have a number of concerns with the mitigation proposed for the fen. The federal mitigation rule states that preservation may be used to provide compensatory mitigation providing a number of conditions are met. One of these conditions is that the resources are under threat of destruction or adverse modification. This clearly is not the case for Browns fen. This fen is designated as Waukesha County open space, and the 3.5 acre fen is currently being managed by the Retzer Nature Center staff. Although there is no conservation easement over this fen complex, the fact that this area is currently in public ownership and is being managed does not meet the requirement that the area proposed for preservation be under threat. Therefore, preservation of this site does not meet the requirements of the mitigation rule. We would, however, be willing to consider some mitigation credit for the proposed control of invasive species at this site. The amount of credit that is appropriate for the invasive species management cannot be assessed until the applicant has provided base line conditions for the areas proposed for management and identified the final management goal in terms of a measurable performance standard. Once we have this information, we can assess how much mitigation credit would be appropriate for the management work.

To fully mitigate for the fen impacts, the applicant still needs to find a suitable fen to preserve. The Wisconsin Guidelines for Compensatory Mitigation recommends a ratio of 0.125: 1 for preservation. It may be difficult for the applicant to find a fen that is large enough to meet this mitigation ratio. If the applicant can find a fen that is truly threatened, but not large enough to meet this mitigation ratio, we would be willing to consider a combination of preservation at one site and re-habilitation at Brown's Fen.

The applicant is proposing to mitigate for all wetland impacts, other than the fen, by using mitigation credits from both the Ryan and Cull DOT mitigation banks. We have no objection to using these mitigation banks to offset wetland impacts provided these banks have enough of the appropriate type of credits available.

The public notice states that the 0.22 acres of work that will be done in Pebble Creek and unnamed tributaries are not considered permanent losses by the applicant. Creek re-alignment will have a permanent impact on the stream. For this reason the applicant needs to mitigate for the creek re-alignment by using natural channel design concepts for any re-aligned stream segments.

Finally, one of the conditions of our concurrence on the proposed alignment was that the applicant would provide some sort of permanent conservation easement over the upland wooded area that was being avoided to preserve interior forest bird breeding bird habitat. We included this condition based on the fact that the applicant made the argument that avoiding the fen would result in significant adverse environmental consequences to the interior forest bird habitat. As far as we know, the applicant has not been successful in getting the landowners agreement to put a conservation easement over this wood lot.

In summary, our review of the information in the public notice has found that the applicant has avoided impacts to the aquatic environment and the proposed alignment is the least damaging practicable alternative. In order to ensure that unavoidable impacts are minimized to the maximum extent possible, the applicant needs to provide information that details what BMPs will be implemented. If a permit is issued for this project, we request that these BMPs become conditions of the permit.

In addition, the proposed mitigation for the fen does not adequately compensate for the impacts to the fen. The applicant needs to find a fen to preserve. If the applicant wants to mitigate using a combination of preservation and re-habilitation of Brown's fen, then the applicant needs to provide detailed information on the management goals of the work proposed at Brown's fen, so we can assess how much mitigation credit would be appropriate for the management work. Since the mitigation plan does include some permittee responsible mitigation, a complete Compensatory Mitigation Site Plan must be prepared, as required in the Wisconsin Mitigation Guidelines.

For the reasons outlined above, EPA objects to the issuance of a permit for this project because it does not comply with the Guidelines.

Thank you for the opportunity to comment on this public notice. If you have any questions regarding these comments please contact Sue Elston of my staff at 312-886-6115.

Sincerely,

A handwritten signature in cursive script, appearing to read "Wendy Melgin".

Wendy Melgin, Chief  
Wetlands Section.